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Supreme Court of the United States

OCTOBER TERM, 1939.

NO. 342.

AMALGAMATED UTILITY WORKERS, Affiliated with UTILITY WORKERS ORGANIZING COMMITTEE, ETC., *Petitioner*,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and ITS AFFILIATED COMPANIES, ET AL., *Respondents*,

In the Matter of the Application of
AMALGAMATED UTILITY WORKERS, ETC.,
To Punish
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and ITS AFFILIATED COMPANIES,
For Contempt.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ET AL.,

v.

NATIONAL LABOR RELATIONS BOARD,

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL.,

v.

NATIONAL LABOR RELATIONS BOARD,

ON WRIT OF CERTIORARI TO THE U. S. CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B-825, ET AL.

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OPINIONS BELOW.

The Memorandum Opinion of the Court below (R. 13) is reported in 106 Fed. (2) 991.

JURISDICTION.

The Order of the Court below (R. 63) was entered on June 2, 1939. Petitioner (hereinafter sometimes referred to as the "Amalgamated") seeks to invoke the jurisdiction of this Court by virtue of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, sec. 1, and Section 10(e) of the National Labor Relations Act.

Petitioner's Motion for an adjudication of contempt against the Respondent Companies, and also that the Court take such action as shall appear just, reasonable and necessary to make effective the Order of the Board as ordered to be enforced by the Court below, and also for general relief as the nature of the case may require, was made and entitled (R. 1) *in the review proceedings instituted, respectively, by the Respondent Companies and by these Respondents, the International Brotherhood of Electrical Workers and seven of its Local Unions, made up of employees of the Respondent Companies, under Section 10(f) of the Act, which were before this Court at the October Term of 1938 and decided on December 5, 1938* (305 U. S. 197). In those proceedings, the Board's Answer asked the Circuit Court of Appeals to *enforce the Board's Order* (95 Fed. (2) 392).

The Matter came before the Court below upon the Petitioner's Notice of Motion and Petition (R. 4-13) with accompanying affidavits, the Motion of the Brotherhood and its said Local Unions to dismiss the said Notice of Motion and Petition of the Amalgamated, the Motion of the Respondent Companies, similar to that of these Respondents, to dismiss the said Notice of Motion and Petition of the Amalgamated, the verified Answer of the

Respondent Companies (R. 14-25), and the answering Affidavit of Floyd J. Carlisle with Exhibits A to H, both inclusive (R. 26-62), showing the Respondent Companies' compliance with the Decree of January 21, 1939.

The Motion of the Brotherhood and its Locals to dismiss the Amalgamated's Petition was ordered by this Court (R. 69), on October 16, 1939, to be inserted in the Record, and appears therein at pages 66-68.

QUESTIONS PRESENTED.

Petitioner has stipulated (R. 2) its intention to bring up for review, and to rely upon, *only* the question as to *whether or not it has standing to make and maintain the Motion, denied by the Court below, to adjudge the Respondent Companies in contempt of Court for alleged violations of the final Decree,* entered upon the application of the National Labor Relations Board, by the Court below on January 21, 1939 (R. 8-9), directing the enforcement of the Board's Order of November 10, 1937, as modified in accordance with the mandate of this Court (305 U. S. 197).

STATUTE.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Sup. II, Title 29, Sec. 151 *et seq.*) are Section 5, Section 6, Section 9, Section 10(a), (b), (c), (d), (e) and (f), and Section 11(1), (2), (3), (4) and (6).

STATEMENT.

The cause, in the Court below, in which the Petitioner's Motion for an adjudication of contempt was filed, as will be seen by reference to its title (R. 1, 4 and 8), was the consolidated proceedings by these Respondents and the Respondent Companies, respectively, under Sec-

tion 10(f) of the Act, to review and set aside the Board's Order of November 10, 1937. The Court below, in said cause, denied relief to these Respondents and the Respondent Companies (95 F. (2) 390), and directed the enforcement of the Board's Order. On Certiorari to the Court below to review said decision, this Court, on December 5, 1938 (305 U. S. 197), directed that the decree in the cause be modified so as to hold unenforceable the provision of Paragraph 1(f) of the Board's said Order, and the application to that provision of Paragraph 2(c) of said Order.* Thereafter, and in accordance with the Mandate of this Court, the Court below, on January 21, 1939, by its final Decree in the cause (R. 8-9), duly modified its original Decree as this Court had directed.

These Respondents, together with the Respondent Companies, were made Respondents in the said proceeding for the adjudication of contempt (R. 1, 8). The Petitioner's Notice of Motion (R. 3) was addressed by Petitioner to counsel for these Respondents (R. 4) as well as to counsel for the Respondent Companies, and to the General Counsel of the Board in Washington, D. C., and its acting Regional Attorney in New York City. Thereafter, Motions to Dismiss Petitioner's said Motion and Petition, on behalf of these Respondents and the Respondent Companies, as well as the verified Answer of the Respondent Companies, with supporting affidavits, referred to above, were filed in the cause. The Motions to Dismiss were argued, and supporting Briefs submitted to the Circuit Court of Appeals, by Counsel for both groups of Respondents who, respectively, filed said Motions.

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* Paragraphs 1(f) and 2(c) of the Board's Order (R. 6-7) had required the Respondent Companies to cease and desist from giving effect to their contracts with these Respondents, and to post notice to the employees of said Respondent Companies stating, among other things, that they would cease and desist in the manner aforesaid.

The Petitioner's Motion (R. 4-13) alleges, in detail, the *proceedings in the cause from their inception before the Board*, to the Board's Order of November 10, 1937, and also the ensuing proceedings to the final enforcing Decree of January 21, 1939. The relief sought against the Respondent Companies, and their respective officers, directors and agents, was that they be adjudged in contempt of the Court below for having failed to comply with its Decree of March 21, 1938, as amended by its Decree of January 21, 1939, and there is added a comprehensive prayer that "thereafter this Court take such action as shall appear just, reasonable and necessary *to make effective the Order of the Board" as ordered to be enforced by the Court below*, and also for *general relief*.

It is to be noted that Petitioner did not file its Motion and Petition as a person aggrieved under Section 10(f) of the Act, nor is there any citation or mention in said Motion and Petition of any provision of the Act, or of the Board's Rules and Regulations, or of any Statute whatsoever, under which jurisdiction was alleged or intimated to exist.

Without reviewing in detail the many allegations of Petitioner's Motion upon which the relief it prays is based, we deem it sufficient for the purposes of this statement, merely to direct attention to *the pervading averments therein showing these Respondents' serious interest in and integral connection with the subject matter involved.**.

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* It is stated in paragraph 4, erroneously, as the Record in the cause in this Court in the October Term, 1938, shows, that "The I. B. E. W. and certain locals thereof applied for permission to *intervene*, which permission was granted." These Respondents, in that case, petitioned the Court below, under Section 10(f) of the Act, as persons "aggrieved," to review and set aside the Board's Order of November 10, 1937.

Virtually all of the matters complained of in the Petition consist of alleged conduct upon the part of the Respondent Companies with and respecting these Respondents, the I. B. E. W. Brotherhood and Locals (R. 9, 10, 11, and 12).

The Motion of these Respondents, and the Motion of the Respondent Companies, to dismiss the Amalgamated's Petition were argued by their respective Counsel in the Court below.

The *grounds* asserted and assigned by these Respondents in support of their said Motion to dismiss the Amalgamated's Petition were, among others, (1) that the Petitioner had no standing, under the Act or otherwise, to institute and maintain the proceeding as said Petitioner, under its Notice of Motion and Petition, was attempting to do; and (2) that the attempted proceeding of Petitioner was in disregard of the Opinion and Mandate of this Court, in the review proceedings in which the Motion was entitled and brought, which Opinion interpreted parts of the Board's Order on which the said Motion relied; and that the Motion was in effect to secure an enlargement and modification of the Board's said Order and the final decree of the Court below, so as to make the Board's Order as modified determine and prohibit matters not determined and prohibited by such Order and Decree.

The Respondent Companies, in both their Motion to Dismiss the Petition of the Amalgamated and their Answer to it on the merits (R. 23), asserted, among other substantial grounds, that the Petitioner had no standing, under the Act or otherwise to institute and maintain the proceeding. The Respondent Companies clearly es-

tablish in their said Answer (R. 14, 22-23) that approximately 65 per cent of their eligible employees are fully paid-up members of these Respondents, and moreover that of the 35 per cent of the employees, outside of the Brotherhood and its Locals, a decided majority are *not members of the Amalgamated,* but of no union at all (R. 28-29). Mr. Carlisle's affidavit states expressly that the membership of the C. I. O. among the Companies' employees has never been stated or described, and even though the C. I. O. was particularly invited to submit a statement or proof of its membership, it was never done. He further states that "the greater part of our employees, who are not members of the I. B. E. W., are members of no union"; and that "in the moving papers on this motion, I find no statement of C. I. O. membership and no facts which are claimed to show or indicate a C. I. O. majority." (R. 29). The Companies further show, in their Answer and in the supporting affidavits (R. 26-62), compliance with Section 9(a) of the Act and with the Opinion and Mandate of this Court.

The Court below denied Petitioner's Motion and Petition, filing only a Memorandum Opinion, of which the full text is (R. 13):

> "Motion denied on ground that moving party has *no standing* to press a charge of civil contempt, if contempt has been committed. *Under the National Labor Relations Act the Board is the proper party to apply to the court for an order of enforcement and to present to the court charges that the Court's order has not been obeyed.*"

The action of the Court below on these Respondents' Motion to Dismiss, and also on the Respondent Compa-

nies' Motion to Dismiss, rendered without opinion, were Decrees reading (R. 68):

> "Motion denied on ground that the matters submitted in support thereof should properly be asserted in opposition to the Amalgamated Utility Workers' motion to punish for contempt."

However, it perfectly appears that the action of the Court below in dismissing the Amalgamated's Motion and Petition was explicity and literally upon the specific ground principally urged in the Motions to Dismiss filed by both the Respondent Brotherhood and Local Unions and the Respondent Companies that the moving party had no standing to press a charge of civil contempt, if contempt has been committed, and that Under the National Labor Relations Act the Board is the proper party to apply to the Court for an Order of enforcement and to present to the Court charges that the Court's Order has not been obeyed. The Brotherhood and its Locals relied on this basic ground, assigned in their Motion to Dismiss, that, as *matter of law*, the Petitioner had no standing to maintain its Petition for an adjudication of Contempt. The *Act* itself, as the *law* of the case, made it unnecessary to file an Answer. And that determinative matter or question of *law* arose and presented itself for decision upon the Petitioner's Motion and Petition *per se*, and irrespective of the matters set up in the Companies' Answer and supporting Affidavits, and was *so disposed* of in the Memorandum Opinion, and the final Order of the Court below dismissing the Motion and Petition.

ARGUMENT.

I.

The Petitioner Had No Right or Standing, Under the National Labor Relations Act, or Otherwise, to Institute and Maintain Its Proceeding Herein for the Order It Prayed to Punish for Contempt, Because Under the Act the Board Alone Is the Proper Party to Apply to the Court for an Order of Enforcement and to Present to the Court Charges That the Court's Order Has Not Been Obeyed.

The Court below held that the "moving party has no standing to press a charge of civil contempt, if contempt had been committed. *Under the National Labor Relations Act the Board is the proper party to apply to the Court for an order of enforcement and to present to the Court charges that the Court's order has not been obeyed*". (R. 13).

The soundness and correctness of the Decision of the Court below upon this point does not, it is respectfully submitted, admit of reasonable doubt. The effect of the Act itself is so plain as to exclude any substantial question as to the propriety of the Court's Decision.

Petitioner had no lawful standing or authority under the Act, or otherwise, to institute and maintain its proceeding and Motion in the Court below for contempt. It is respectfully submitted that only the Board is authorized by the Act to enter Orders under and within the scope of the Act, to petition the Circuit Courts of Appeals, or, in the alternative, the other Federal Courts designated by the Act, to enforce its Orders, and, for the protection of those for whom the Act authorizes the

Board to enter its Orders and to apply to the Courts for their enforcement, to take action to have the Courts punish for contempt those who violate the decrees of the Courts enforcing the Board's Orders. That such is the effect and intent of the Act is apparent throughout its context and particularly in Section 5; Section 6; Section 9; Section 10(a), (b), (c), (d), (e) and (f) and Section 11(1), (2), (3), (4), and (6).

If private parties, whether individuals or labor organizations, irrespective and independent of action by the Board, could institute proceedings to punish for contempt for violations, including continued violations, of the Board's Orders and of the Decrees, enforcing such Orders, then any such parties could renew and continue the litigation of the questions involved in the proceedings upon which the Board and the Courts had passed, without end. And instead of the Board, upon its responsibility under the Act, being the official Actor in the proceedings to protect its Orders and effectuate the Act, any employee or group of employees could usurp and assume that exclusive function and duty of the Board. The purposes of the Act, and the authority and duty of the Board thereunder to pass the orders provided for by the Act for the protection of those whom the Board is constituted to protect, make and establish the Board as the sole functionary or agency appointed and directed to afford such protection, and to effectuate such protection by securing the enforcement of its Orders by the decrees of the Courts upon its, the Board's, application to that end, and *a fortiori*, if the decrees of the Courts so passed be disobeyed or violated by the persons who are directed to obey them, it is the exclusive function and duty of the Board to ask the Courts to enforce their decrees by

supplemental decrees, or by proceedings for contempt, or in such manner as may be appropriate to the particular occasion. If parties other than the Board had the right to anticipate and forestall the function of the Board to apply to the Court for enforcement and effectuation of the Board's Orders, and for enforcing and effectuating the Courts' decrees passed specifically to enforce the Board's Orders, then the powers and duties of both the Board and the Courts, *as definitely ascertained and marked out by the Act*, would be subject to invasion and usurpation by unofficial parties, and the effectuation of the Act and of the powers and duties of the Board would be thrown into endless confusion. In brief, the Act has exactly, throughout its several provisions, established and commanded the Board to protect the rights of those whom the Board and its powers were ordained to protect, and it is for the Board exclusively to exercise those functions in the public interest, without power upon the part of the Board to abdicate them, and without the right upon the part of anyone else, individual or organization, to invade or usurp them.

If employees are injured, in violation or derogation of the Act, by the failure of any employer to obey and carry out a decree of a Court enforcing an Order of the Board, the plain, appropriate remedy of such employees is to *apply to the Board* to take steps to relieve them of their injury by applying to the Court to enforce its own decree whether by contempt proceedings or other appropriate mandate or remedy. The Board may pass and enter an Order, and then may decide never to ask for its enforcement, or at any time, prior to filing a transcript of the record in a Circuit Court of Appeals upon a petition for enforcement or for review, it may *vacate or mod-*

ify its Order, and the individual or union, upon whose complaint the Board acted by instituting the proceeding, has not the slightest right to require the Board to apply to the Court for the enforcement of its Order, or to proceed for enforcement, or resist a review, if, before filing the transcript, it decides to rescind or change its Order.

Meyers v. Bethlehem etc. Co., 303 U. S. 41; 48; 49, 50; 51.
Newport News etc. Co. v. Schauffler, 303 U. S. 54; 57-58.
Petition of N. L. R. B., 304 U. S. 486; 492-494; 495.

The similar corresponding language of *the Federal Trade Commission Act* does not give any right to a person aggrieved by any violation of that Act to a proceeding or remedy to enforce that Act by proceedings for contempt or in any other manner. In this respect the National Labor Relations Act was explicitly analogized to the Federal Trade Commission Act in the Report of the Committee of the House of Representatives submitted to the House with the formulated Bill, which became the National Labor Relations Act, and the Committee's recommendation of its passage. In that Report, No. 972 of the 74th Congress, the Committee said:

> "The Board is empowered, according to the procedure provided in Section 10, to prevent any person from engaging in any unfair labor practice listed in Section 8 'affecting commerce', as that term is defined in Section 2(7). *This power is vested exclusively in the Board and is not to be affected by any other means of adjustment or prevention.* The Board is thus made the *paramount agency* for dealing with the unfair labor practices described in the bill.

> *"The procedure provided is analogous to that in the Federal Trade Commission Act (Sec. 5) and is familiar to all students of administrative law. * * **
>
> *"* * * No private right of action is contemplated.* Essentially the unfair labor practices listed are matters of *public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint.* The form of injunctive and affirmative order is necessary to effectuate the purpose of the bill to remove obstructions to interstate commerce which are by law declared to be detrimental *to the public weal."*

The above specific declaration of the House Committee, condensed but undiminished in substance, is expressed in Section 10(a) of the Act itself:

> "Sec. 10(a). The *Board* is empowered, as hereinafter provided, to prevent *any* person from engaging in any unfair labor practices (listed in section 8) affecting commerce. *This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."*

The power provided by the Act to relieve against and prevent unfair labor practices is thus not only vested in the Board, but is made unmistakably "exclusive", and not only "exclusive" but so utterly and absolutely "exclusive" that it is additionally declared by the Act that it, the said power, "shall *not be affected* by any other means of adjustment or prevention that has been or may be established by *agreement, code, law, or otherwise."*

Nor does the Act leave the matter, as an absolutely exclusive power in the Board alone, to rest even upon those provisions, comprehensive, conclusive and secure

as they obviously are. It expressly, consistently and decisively vests *all power of enforcement in the Board alone, confines the power there* and *excludes and precludes its existence anywhere at all outside of the Board.* All the enforcement powers of Section 10, in terms too plain to admit of any doubt, concur specifically and invariably to that effect and that end. The Act empowers the *Board* to have its Orders *enforced* by the *Courts*, and declares the *Board's powers and those of the Courts* to be *exclusive!*

Besides, as is now fully settled and understood, the policy and purpose of the Act were to maintain an unburdened, unobstructed and uninjured interstate commerce, by preventing the burden, obstruction and injury which strife and interruptions growing out of labor controversies impose and inflict upon that commerce, which the Board is constituted and empowered, as the responsible and exclusive public agency, to protect. The paramount policy and purpose of the Act were so expounded and declared by this Court in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 37-41; *Consolidated Edison Company of New York, Inc., and International Brotherhood of Electrical Workers v. National Labor Relations Board*, 305 U. S. 197, 220-221; *National Labor Relations Board v. Fainblatt*, 306 U. S. 601.

The Decision below is clearly sustained by the Decisions of this Court construing and giving effect to the National Labor Relations Act, wherein the exclusive powers of the Board with respect to proceedings before it under the Act and with respect to the enforcement of its Orders, have been considered and passed upon.

"The power 'to prevent any persons from engaging in any unfair practice affecting commerce' has

been vested by Congress in the Board and the Circuit Court of Appeals, and Congress has declared: 'This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.'"

Meyers v. Bethlehem Shipbuilding Co., 303 U. S. 41, 48, 51.

Newport News Shipbuilding Co. v. Schauffler, 303 U. S. 54, 57-58.

In the Matter of the Petition of the N. L. R. B., 304 U. S. 486; 492-494; 495.

Moreover, the Decision of this Court upon the virtually identical provisions, in the Federal Trade Commission Act, with the provisions for procedure and enforcement in the National Labor Relations Act has adjudicated and settled the intent and effect of such legislation.

Federal Trade Commission v. Klesner, 280 U. S. 19, 25.

In *Federal Trade Commission v. Klesner*, 280 U. S. 19, this Court, speaking of Section 5 of the Federal Trade Commission Act, with which the Report of the Congressional Committee substantially identified the procedure prescribed in the Wagner Act, said (p. 25):

"* * * Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs. The formal complaint is brought in the Commission's name; the prosecution is wholly that of the Government; and it bears the entire expense of the prosecution. A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may of

course bring the matter to the Commission's attention and request it to file a complaint. But a denial of his request is final. And if the request is granted and a proceeding is instituted, he does not become a party to it or have any control over it."

Each and every one of the salient matters referred to in the above excerpt from the Opinion in the Klesner Case applies under the provisions of and the procedure prescribed by the National Labor Relations Act, and it is noteworthy that such has been the procedure invariably obtaining and never departed from under the operation of the Act, and now firmly settled as the practice without exception.

It is clear under the Federal Trade Commission Act, and equally clear under the National Labor Relations Act, that a private person, corporation or other entity may not file or maintain any complaint which may be prosecuted before the Commission under the former Act, or before the Board under the latter. Under both Acts, if there is to be any prosecution of any complaint or proceeding against any alleged offender, it must be by and in the name of the Commission or the Board, representing and acting as and for the Government, which alone initiates, maintains, conducts and defrays the expense of the proceeding, in every instance, exclusively and alone.

Moreover, the Decision of the Court below concurs and is entirely uniform with decisions of other Circuit Courts of Appeals in their potential denial of any standing on the part of an employee or a union of employees to maintain proceedings in Court for *the enforcement of orders of the Board*. The holding in other Circuits is that the procedure provided by the Act is not and cannot be

"made a private one to enforce a private right. It is a public procedure looking only to public ends."

Agwilines, Inc., v. National Labor Relations Board, 87 F. (2) 146, 150 (C. C. A. 5).
National Labor Relations Board v. Colton, 105 F. (2) 179 (C. C. A. 6).
National Labor Relations Board v. Hearst, 102 F. (2) 658, 664 (C. C. A. 9).
National Labor Relations Board v. Carlisle Lumber Company, 99 F. (2) 533, 537 (C. C. A. 9).

An employee or a union of employees may *file a charge with the Board* under the Act, Section 10(b), *but, upon their own part, may not proceed beyond that.* The Board alone may and must decide whether or not it will make or issue a complaint upon the charge and whether or not any proceeding thereon shall ensue. If the Board decides that there shall be such complaint and proceeding it retains exclusive and complete control over every following stage of the hearing, decision and the proceeding, if any, to enforce its decision. Even after rendering a decision and order the Board may decide, in its own discretion, to rescind or modify it, or not to ask for its enforcement in either its original or modified form, and no one, employee or union of employees, or employer, or any other governmental authority, may control, or impose any restriction or requirement upon, the Board's discretion to apply or not to apply to the Court for an enforcement of its order at any stage or in any respect. *Re, National Labor Relations Board*, 304 U. S. 492-495. The only qualification to the power and discretion, above stated, of the Board is the right of *"any person aggrieved" by an Order of the Board* (*not* by a *Decree* of a Circuit Court of Appeals *enforcing* such Order)

to petition the Courts designated in Section 10 of the Act to *review* and *either set aside or modify an Order of the Board.*

It is thus plainly manifest that no person or association or union of employees have any standing in Court respecting an Order of the Board in any particular, unless they are *"aggrieved"* by the Order and that such standing, as a person aggrieved by the Order, is strictly limited and confined to a proceeding by petition to the Court to review the Order and set it aside or modify it. All the sub-paragraphs of Section 10, and particularly Section 10(f), are, beyond misunderstanding, to that effect.

Not only the sub-paragraphs of Section 10, but as mentioned hereinabove, Section 5, Section 6, Section 9, and Section 11 (1), (2), (3), (4) and (6) of the Act, have the same unmistakable intendment. Section 5 and Section 6 vest in the Board, solely, full and complete discretionary authority to "prosecute any inquiry necessary to its functions" and to "make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of this Act." *Section 9*, dealing with and providing for *"Representatives and Elections,"* provides that representatives designated or selected for the purposes of collective bargaining by the majority of the employees in an appropriate unit shall be the exclusive representatives of all the employees in such unit for such purposes, and affords to employees the right to present grievances to their employer, and proceeds to prescribe the powers of the Board to secure such representation in the manner provided.

Under "Prevention of Unfair Labor Practices," Section 10(a) *expressly* makes the power of the *Board*, in

its function designated in the caption to the Section, *absolutely exclusive.*

Subsection (b) provides that whenever "*it is charged*" that any person has engaged or is engaging in an unfair labor practice, the Board, or any agent designated by the Board for such purposes, shall have the power to issue and cause to be served upon such person a complaint, etc., containing a notice of hearing before the Board, etc. The Section does not specify the person or persons by whom such charge may or shall be made. If *any* person who makes *any* such charge acquires thereby the right to control or direct the proceeding before the Board upon a complaint issued by it, or to enforce an Order of the Board made thereon, or to apply to a Circuit Court of Appeals to enforce such an Order, then such rights inhere in a countless number of persons, by whom the administration and effectuation of the Act may to an extent without assignable limits be shared with, or withdrawn from, the Board itself. The administration and enforcement of the Act could be taken over by an indefinite number of persons to the inestimable detriment of the functions and responsibilities of the Board. On the contrary, whilst a *charge* may be *made to the Board*, subsection (b) gives no further rights to the person making the charge, but lodges all power respecting it in the Board alone, until, under subsequent provisions of Section 10, the *Board* is empowered to apply to a Circuit Court of Appeals to *enforce* its Order.

Subsection (c) plainly vests exclusive power in the Board respecting the matters which that subjection deals with. And subsection (d) expressly provides that until a transcript of the record shall have been filed in Court, upon an application by the Board for enforcement, or

upon a Petition to the Court by a party aggrieved by an Order of the Board to review it, "the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or Order made or issued by it". Subsection (e) confers upon the Board the power to petition the designated Courts "for the enforcement of its Order and for appropriate temporary relief or restraining Order", and requires the Board to file in the Court a certified transcript of the Record in the proceeding, etc., whereupon the jurisdiction of the Court *shall be exclusive*, etc. Subsection (f) gives to "any person aggrieved by a final Order of the Board" the right to *obtain a review* of such Order in any of the designated Courts *by filing in such Court a written Petition* praying that the Order of the Board be modified or set aside and, upon the filing of the certified transcript, the Court "shall have the *same exclusive* jurisdiction to grant *to the Board* such temporary relief or restraining Order as it deems just and proper, and in like manner to make and enter a Decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part, the Order of the Board".

Plainly all these powers are to be exercised by the Board and said Courts *exclusively*.

Section 11 vests the *Board* with "Investigatory Powers" for the purpose of *all hearings and investigations*, which, in the opinion of the Board, are *necessary and proper for the exercise of the powers vested in it by Section 9 and Section 10*. By sub-section (1) the Board is given the right of access to any relevant evidence of any person being investigated or proceeded against, and to issue subpoenas and administer oaths; by sub-section (2),

in cases of contumacy or refusal to obey such subpoenas, designated Courts, upon application by the Board, are given jurisdiction to enforce appropriate obedience; sub-section (3) contains provisions relating to self-crimination in giving evidence in obedience to the subpoena of the *Board;* sub-section (4) provides methods for the service of the *Board's* processes and provides that fees and mileage of witnesses summoned before the Board shall be the same as those in the Courts of the United States; and by sub-section (6) the *Board,* upon its request, may, when the President so directs, obtain all records, papers and information from the several departments and agencies of the Government relating to any matter before the Board.

It is respectfully submitted that there is not a word in any section or provision of the Act which sanctions the contention that any one, other than the Board itself, may take over or execute any of the powers or functions which the Act confers and imposes upon the Board alone. The Act throughout negatives any such assumption.

II.

Petitioner's Motion, Which the Court Below Denied, Contravenes the Opinion and Judgment of This Court in the Review Proceedings in Which It Is Entitled and Brought, Which Opinion Interpreted the Parts of the Order of the Board on Which the Motion Mainly Relies; the Motion Being in Effect to Secure an Enlargement and Modification of the Order of the Board and the Final Decree of the Court Below and to Expand the Scope and Operation of the Order and Decree, so as to Make the Board's Order as Modified Apply to and Determine and Prohibit Matters Not Litigated, Determined and Prohibited by the Order and Decree.

The Motion of the Petitioner is in derogation of the Opinion and Judgment of this Court, rendered December 5, 1938, in the review proceedings in which the Motion herein is entitled and brought. In its Opinion, this Court construed and limited the particular parts of the Order of the Board upon which the Motion herein for contempt materially relies. The Opinion of this Court discloses that the Motion herein is largely to secure a modification and enlargement of the Order of the Board in excess and beyond the limitations which this Court expressly put upon the Board's Order. Such an expansion of the scope and operation of the Order of the Board and the Decree of the Court below, pursuant to the Opinion and Mandate of this Court in directing the modification of the Board's Order, would be directly in contravention of the Opinion and Mandate of this Court and, in effect, impair and undo an essential part of that Opinion and Mandate.

With reference to this subject, the substance of the complaint of the Amalgamated, set forth in detail

throughout its Petition, is of things alleged to have been done by the Companies, and things which the members of the Brotherhood Unions, these Respondents, are alleged to have done with the sanction of the Companies. *The essence and burden of the Motion and complaint are that the Companies have continued to bargain collectively and deal with these Respondents, the Brotherhood and its Locals, in recognition and pursuance of the contracts, between the Companies and these Respondents, which this Honorable Court saved from abrogation and upheld as valid and operative, instead of bargaining and dealing with the Amalgamated.*

The recalcitrant attitude of the Petitioner toward this Court's Decision upholding the contracts between Companies and these Respondents, and declaring the effect of Paragraph 1 (g) of the Board's Order of November 10, 1937 (305 U. S. p. 239) is apparent upon page 6 of the Petitioner's Brief, stating that "Respondents started a drive of its employees into the I. B. E. W. And that *this drive resulted in the transformation of the seven company unions into seven alleged 'locals' of the I. B. E. W.; and the execution of so-called collective bargaining agreements between the Respondents and the said company unions, rechristened 'local unions' of I. B. E. W., during the pendency of the proceedings before the National Labor Relations Board. It is these contracts that were intended to be reached by paragraph 'f' of the Board's order quoted above.*"

The Amalgamated's Motion and Petition, and its complaint therein, are founded and asserted upon Paragraph 1(f), *formerly 1 (g)*, of the Board's Order of November 10, 1937, which provides that the Companies shall "cease

and desist" from "Recognizing the International Brotherhood of Electrical Workers as the exclusive representative of their employees".

This Court will recall that, with reference to said Paragraph 1(g) of the Order, it declared in its Decision of December 5, 1938, of the cases presented by the Petition of the Companies and the Petition of the Brotherhood and its Locals:

> "Subdivision (g) of that paragraph, requiring the companies to cease recognizing the Brotherhood 'as the exclusive representative of their employees', stands on a different footing. The contracts do not claim for the Brotherhood exclusive representation of the companies' employees but only representation of those who are its members, and the continued operation of the contracts is necessarily subject to the provision of the law by which representatives of the employees for the purpose of collective bargaining can be ascertained in case any question of 'representation' should arise. Section 9. *We construe subdivision (g) as having no more effect than to provide that there shall be no interference with an exclusive bargaining agency if one other than the Brotherhood should be established in accordance with the provisions of the Act. So construed, that subdivision merely applies existing law.*"

With reference to the making of these contracts, this Honorable Court in its Opinion rendered by Mr. Chief Justice HUGHES, page 232 of 305 U. S., said:

> "It also appears from the evidence, which was received without objection, that the Brotherhood and its locals comprised over 30,000 or 80 per cent of the companies' employees out of 38,000 eligible for membership."

And at pages 236-237, the Court further said:

"The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. Under Section 7 the employees of the companies are entitled to self-organization, to join labor organizations and to bargain collectively through representatives of their own choosing. The 80 per cent. of the employees who were members of the Brotherhood and its locals, had that right. They had the right to choose the Brotherhood as their representative for collective bargaining and to have contracts made as the result of that bargaining. * * * The Board by its order did not direct an election to ascertain who should represent the employees for collective bargaining. Section 9 (c). Upon this record there is nothing to show that the employees' selection as indicated by the Brotherhood contracts has been superseded by any other selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute. * * * Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree. Representing such a large percentage of the employees of the companies, and precluding strikes and providing for the arbitration of disputes, these agreements are highly protective to interstate and foreign commerce. They contain no terms which can be said to 'affect commerce' in the sense of the Act so as to justify their abrogation by the Board. *The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of employees, would remove that salutary protection during the intervening period.*"

And at pages 237-238, the Opinion of His Honor, the Chief Justice of this Court, further states:

> "The Board insists that the contracts are invalid *because made during the pendency of the proceeding*. But the effect of that pendency would appropriately extend to the practices of the employers to which the complaint was addressed. See Jones v. Securities & Exch. Commission, 298 U. S. 1, 15, 80 L. ed. 1015, 1020, 56 S. Ct. 654. It did not reach so far as to suspend the right of the employees to self-organization or preclude the Brotherhood as an independent organization chosen by its members from making fair contracts on their behalf."

And, further, upon page 238, the Court said:

> "The Brotherhood was entitled to form its locals and their organization was not assailed. The Brotherhood and its locals were entitled to solicit members and the employees were entitled to join. These rights cannot be brushed aside as immaterial for they are of the very essence of the rights which the Labor Relations Act was passed to protect and the Board could not ignore or override them in professing to effectuate the policies of the Act. To say that of the 30,000 who did join there were not those who joined voluntarily or that the Brotherhood did not have members whom it could properly represent in making these contracts would be to indulge an extravagant and unwarranted assumption."

And after concluding "that the Board was without authority to require the petitioning companies to desist from giving effect to the Brotherhood contracts, as provided in subdivision (f) of paragraph one of the Board's order", the Court expressed its judgment and determination, above recited, respecting subdivision (g), now (f), of Paragraph 1 of the Order.

As of March, 1939, a careful and exhaustive verification by the Respondent Companies and also by these Respondents, the Brotherhood and Local Unions, of the membership and dues records indicated 65% of the employees of the Companies as members of the Brotherhood and its Locals with dues fully paid. This is shown elaborate detail in the Affidavit of Mr. Floyd L. Carle and reference to the Affidavit of Dr. J. J. Wittmer, the printed Record herein. These Affidavits fully support Paragraphs VIII and IX of the Respondent Companies' Answer (R. 19-21), and also Paragraphs XIV, XV and XVI of their Answer (R. 22-23).

For the exhaustive details upon this subject, the attention of this Court is respectfully directed to the Affidavit Mr. Carlisle (R. 28-29) as to Membership of Employees Labor Organizations; and (R. 28-30) as to The Collective Bargaining Contracts in Force Between the I. B. W. and the Companies; and particularly (R. 32-36) upon recent Checking and Verification of the Extent of B. E. W. Membership Among the Companies; and see e Report of Dr. Wittmer, included in Mr. Carlisle's Affivit (R. 32-34) and Dr. Wittmer's conclusion (R. 34).

See also Exhibit "F": I. B. E. W. Membership Among nployees of the Companies, Determined from Review Membership Records During March, 1939 (R. 58).

It thus clearly appears that in making and continuing e contracts of these Respondents, the Brotherhood and Local Unions, with the Companies, 65% of the employees have selected and continued the Brotherhood d its Locals as their representative for the purposes of lective bargaining. Accordingly, it would seem that e essential object of the Amalgamated's Petition and

Motion was to avoid the conditions and proceedings sanctioned by this Honorable Court in its Opinion and Judgment in the cases in question and, in effect, to suppress or evade the clear determinations of this Court therein.

Moreover, the Opinion of His Honor, Mr. Chief Justice HUGHES, for the Court, in the cases referred to, refers repeatedly to Section 9(a) of the National Labor Relations Act in connection with the subjects embraced in the above-recited excerpts from the Opinion. That Section, 9(a), provides:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

In the *Jones and Laughlin case* (301 U. S. 1, 44), this Court held that the obligation to deal with the true representative imposes the negative duty to treat with no other. The Circuit Court of Appeals has held that there is no duty to bargain if the representatives are not the proper representatives of the majority in an appropriate unit. *Mooresville Cotton Mills v. National Labor Relations Board* (C. C. A., 4th), 94 Fed. (2nd) 61, affirmed on rehearing 97 Fed. (2nd) 959.

Under the rulings of the Board, the Companies were under no duty to bargain or deal also with a minority labor organization. The Board held in the case of *Mooresville Cotton Mills and Local 1221, United Textile*

Workers of America, 2 N. L. R. B. 1081, that it was not an unfair labor practice for an employer to refuse to discuss grievances with employees' representatives who do not represent a majority of an appropriate unit. See, also, *Matter of Williams Manufacturing Company, Portsmouth, Ohio*, 6 N. L. R. B. 30, where the Board dismissed the charge of violation of Section 8(5) of the Act because of the failure to show majority representation at the time requests to bargain were made. See, also, *Matter of M. Lowenstein & Sons, Inc.*, 6 N. L. R. B. 37, and *Matter of Titan Metal Manufacturing Company*, 5 N. L. R. B. 81.

CONCLUSION.

Accordingly, it is respectfully submitted, for the Respondents, the International Brotherhood of Electrical Workers and Local Unions, that the Decree of the Court below, dismissing the Petition, should be affirmed.

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